# A CRITICAL ANALYSIS ON HOW THE COURTS HAVE CIRCUMVENTED ABUSE ARISING FROM THE SHORTFALLS OF LEGISLATION IN BUSINESS RESCUE

***Yatzee Investments CC v CAPX Finance Pty Ltd* (3300/2015) [2015] ZAWCHC 117 (26 August 2015)**

**Name: Morwesi Mashego**

**Student Number:215063906**

**Supervisor: Professor J Calitz**

**A CRITICAL ANALYSIS ON HOW THE COURTS HAVE CIRCUMVENTED ABUSE ARISING FROM THE SHORTFALLS OF LEGISLATION IN BUSINESS RESCUE**

***Yatzee Investments CC v CAPX Finance Pty Ltd* (3300/2015) [2015] ZAWCHC 117 (26 August 2015)**

## 1. Introduction

It has been long enshrined in the South African company law that where a company is struggling to pay its debts or meet its obligations, it should first be established whether there is any possibility of recovery prior to bringing the company to its dissolution.[1] For years, judicial management was viewed as a mechanism that provided the courts with a reliable assessment to determine whether a company could recover if placed under the rescue mechanism.[2] In recent years, it became apparent that the regime was failing and that it was rarely used.[3] One of the reasons attributed to its failure is that it was a costly process to see through as it involved protracted court processes.[4] Some even went as far as calling it "a spectacular failure", and thus led to its termination.[5] Consequently, judicial management was replaced with business rescue.[6]

Business rescue was in introduced in the South African legislation for the first time in May 2011.[7] This was to align the country's corporate rescue culture with that of developed



[1] *Rennie v Holzman* 1989 2 SA 374 (A) (9 May 1989).

[2] Henning and Rajak "Business rescue for South Africa" 1999 *South African Law Journal* 262 266.

[3] *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 (Pty) Ltd* 2012 2 SA 423 (WCC) 21.

[4] Loubser "Tilting at windmills? The quest for an effective corporate rescue procedure in South African law" 2011 *South African Mercantile Law Journal* 1 21.

[5] Kloppers "Judicial management – A corporate rescue mechanism in need of reform?" 1999 *Stellenbosch Law Report* 417 426.

[6] Joubert ""Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?" 2013 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 550 550.

[7] See Chapter 6 of Companies Act 71 of 2008 Act (hereinafter "2008 Companies Act"). Further, it is worth noting that business rescue is applicable not just to companies but in terms of s 66 (1A) of the Close Corporations Act 69 of 1984 (hereinafter "Close Corporations Act"), it is also applicable to close corporations. As such, the terms "company" or "director" will be used interchangeably with "close corporation" or "members" in this paper.

jurisdictions such as United States of America (US), the United Kingdom (UK) and Australia.[8] One of the distinguishable features of business rescue is that parties can either commence business rescue proceedings by a board resolution or by court procedure.[9] The introduction of the option to commence business rescue by a board resolution makes the procedure less costly and more accessible for companies.[10] The purpose of business rescue is to provide an efficient rescue mechanism that would assist financially distressed companies to recover whilst taking into account the rights and interests of all stakeholders.[11] It is important for directors to bear in mind when contemplating the placement of a company under business rescue that: "…business rescue proceedings are not for the terminally ill close corporations. Nor are they for the chronically ill. They are for ailing corporations, which, given time, they will be rescued and become solvent".[12] More importantly, it has been acknowledged that business rescue is a new invention for South Africa[13] and therefore can easily fall prey to misuse. It is important that controls are put in place to avoid any such exploitation and that effect is given to the actual purpose of the regime, as intended by the legislature.

### 1.1 Problem statement

It cannot be denied that the objectives of business rescue have the potential to preserve companies and thereby achieve a positive impact on the economy.[14] However, it must be acknowledged that the regime did bring about some challenges in its implementation.[15] As a consequence, courts found themselves inundated with the task of understanding and interpreting

[8] Joubert (n 6) 550. Kindly take note that these jurisdictions will not be discussed any further in this paper.

[9] See ss 129 and 131 of the 2008 Companies Act.

[10] Loubser *Some Comparative Aspects of Corporate Rescue in the South African Company Law* (2010 thesis SA) 161.

[11] s (7k) of the 2008 Companies Act.

[12] *Welman v Marcelle Props 193 CC* (33958/2011) 2012 ZAGPJHC 32 (24 February 2012).

[13] *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 ZAGPPHC 103 (30 May 2011) (unreported).

[14] Bradstreet "The leak in the Chapter 6 lifeboat: Inadequate regulation of business rescue practitioners may adversely affect lenders' Willigness and the growth of the economy" 2010 *Mercantile Law Journal* 195 198.

[15] *Panamo Properties (Pty) Ltd v Nel* 2015 3 All SA 274 (SCA) (27 May 2015) 2.

the meaning of some of its provisions, as contained in the 2008 Companies Act.[16] This is mainly due to the fact that some of the provisions under Chapter 6 of the 2008 Companies Act are contradictory and unclear, thereby leaving room for misperceptions and abuse.[17] As a function of the judiciary, courts have the responsibility of interpreting laws in a manner that gives sensible meaning to the intention of the legislature.[18] The purpose of this paper is to analyse whether the court in *Yatzee Investments CC v CAPX Finance Pty Ltd*[19] judgment correctly interpreted section 129(5)(a) of the 2008 Companies Act, in light of all the relevant factors which are to be discussed later.

### 1.2 Methodology

Part one of the dissertation gives a brief background on business rescue and an introduction of some of its problems. Part two introduces the case by setting out a brief summary of the facts and the judgment. In part three, the paper discusses the legal framework relating to the issues that the court had to deal with. Part four provides an analysis of the judgment against the legal findings. Lastly, part five concludes the paper by making recommendations on how courts can better deal with some of the deficiencies of the legislature.



## 2. Case discussion - *Yatzee Investments CC v CAPX Finance Pty Ltd*[20]

### 2.1 Facts

Yatzee Investments CC (hereinafter the "Applicant") conducted an estate agency business.[21] Its most highly valued asset was a commercial property which had been acquired with loans worth R10 000 000 from Combined Mortgage Nominees Pty Ltd (hereinafter "Third Respondent") on

[16] *Ibid*.

[17] *Ibid.*

[18] Botha *Statutory Interpretation: An Introduction for Students* (2012) 38.

[19] 2015 ZAWCHC 117 (26 August 2015).

[20] *Ibid.*

[21] *Ibid* at par 3.

24 August 2008.[22] A mortgage bond amounting to R12 000 000 was registered against the property in favour of the Third Respondent.[23] Heindrich Koorts (hereinafter the "Fourth Respondent"), the sole member of the Applicant stood as surety and co-principal debtor in favour of the Third Respondent for the amount of R8 496 000.[24] However, the Applicant became unable to keep up with its payment obligations.[25] Consequently, it was placed under voluntary business rescue.[26] Thereafter, a business rescue practitioner was thereafter appointed by Companies and Intellectual Properties (hereinafter the "CIPC") on 31 July 2012.[27] It became apparent to the practitioner that it did not seem reasonable to believe that the Applicant could be rescued.[28] After making this observation, he terminated the proceedings in accordance with section 141(2)(a)(i) of the 2008 Companies Act.[29] In addition, the practitioner applied to the court for a liquidation order which, after some negotiations with the Fourth Respondent, were withdrawn on 31 May 2013.[30] The Fourth Respondent then approached the lawyers of the Third Respondent to discuss the possibility of settling the debt.[31] After a period of five months of unsuccessful negotiations, the Third Respondent decided to proceed with the summary judgment application.[32] Soon thereafter the Fourth Applicant, again, applied to have the Applicant placed under voluntary business rescue.[33] The application was granted on the same day that the Third Respondent intended to move for summary judgment against the Applicant and the Fourth



[22] *Ibid* at par 4.

[23] *Ibid* at par 4.

[24] *Ibid*.

[25] *Ibid* at par 5.

[26] *Ibid* at par 6.

[27] *Ibid.*

[28] *Ibid*.

[29] *Ibid.*

[30] *Ibid*.

[31] *Ibid* at par 8.

[32] *Ibid*.

[33] *Ibid*.

Respondent.[34] This resulted in the Third Respondent obtaining summary judgment against the Fourth Respondent only, which the Fourth Respondent did not even attempt to satisfy. [35]

At the first meeting of creditors, the business rescue practitioner informed them that he was unable to inform them of the financial standing of the Applicant as the financial statements were still being finalised.[36] However, he expressed that there was a reasonable prospect that the Applicant could be rescued if repayments to the Third Respondent could be restructured.[37] He further mentioned that gathering information with respect to the Applicant's financial position proved to be challenging.[38] This led to the practitioner making numerous applications to the court in order to extend the date of publishing the rescue plan.[39] The Third Respondent eventually opposed the last application by making its own application to have the Applicant placed under provisional liquidation.[40]

In court, it became apparent that the business rescue practitioner was not even clear on the value of the property as he was still waiting for an independent valuator to provide him with valuations.[41] Further, he informed the court that the Fourth Respondent had informed him that there would be commission received by the Applicant stemming from the sale of various immovable properties.[42] Unfortunately, the Fourth Respondent was unable to furnish him with the schedule evidencing the various sales.[43] The practitioner also disclosed that the Fourth Respondent had further told him that he was in negotiations with a potential investor, whom he could not disclose much about due to the sensitive stage of the negotiations.[44] In the affidavit of the business rescue practitioner, reference was made about two other offers that had been made



[34] *Ibid*.

[35] *Ibid* at par 9.

[36] *Ibid* at par 10.3.

[37] *Ibid*.

[38] *Ibid* at par 12.

[39] *Ibid*.

[40] *Ibid* at par 2.

[41] *Ibid* at par 13.

[42] *Ibid* at par 14.

[43] *Ibid.*

[44] *Ibid* at par 15.

to purchase the property.[45] However, there were no signed documents to support this claim.[46] The court highlighted there was a contradiction between the affidavit deposed by the Fourth Respondent to place the Applicant under business rescue and the motivation of the practitioner to draft the business rescue plan.[47] According to the practitioner, the Applicant had made great progress on improving the cash flow issue, whilst the affidavit deposed by the Fourth Respondent expressly stated that the debt was multiplying and that the company was placed under extreme financial burden.[48]

The main issues that arose before the court were as follows:

1. the consequences of non-adherence with the procedural requirements stated under section 129;[49] and
2. what is expected of a member prior to deciding to pass a resolution to place a company under business rescue.[50]



**2.2 Judgment**

To address the issue pertaining to non-compliance with the procedural requirements under section 129, the court cited the *Panamo* case.[51] In this case it was explained that where a resolution to commence business rescue has been passed and it appears that there has been non-compliance with the provisions set out in section 129(3) and/or (4), the resolution will lapse and become null.[52] However, it was highlighted by the court that in order to have the resolution set aside, an application would have to be made to the court in accordance with section 130(1)(a)(iii).[53] And if the court decides to grant an order to set aside the resolution, the business

[45] *Ibid* at par 20.3.

[46] *Ibid.*

[47] *Ibid* at par 25.

[48] *Ibid* at par 24 and 25.

[49] *Ibid* at par 29.

[50] *Ibid* at par 37.

[51] *Panamo Properties (Pty) Ltd and Another v Nel* (n 15).

[52] *Ibid* at par 29.

[53] *Ibid*.

rescue proceedings will come to an end.[54] It was concluded that by intervening, courts can avoid situations where business rescue is terminated over minor reasons relating to non-compliance with time periods as opposed to, for instance, a company's lack of a reasonable prospect of being rescued.[55] As a result, the court in the *Yatzee Investments*[56] case therefore concluded that there was substantial compliance with the procedural requirements by the company.[57]

In dealing with the requirements that a director should comply with prior to passing a resolution to place a company under business rescue, the court referred to the ratio given in the *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*.[58] In this case the court acknowledged that a reasonable prospect under the 2008 Companies Act is a much lesser threshold to that which was required under judicial management.[59] The court held that the prospect of a company being rescued must be based on reasonable grounds.[60] It also stated that it will not be sufficient to place a company under business rescue based on speculative suggestions.[61] It further elaborated that in order for the court to be convinced that reasonable grounds are in existence, the applicant must make it clear in the founding papers.[62]

In addition, the court in the *Yatzee Investments*[63] case also referred to *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers and Others*.[64] In this case it was pointed out that courts must avoid being prescriptive about how a reasonable prospect should be assessed.[65] However, it was emphasised that the directors voting for the resolution to place the company under business rescue must honestly believe that the prospect of rescuing the company



[54] *Ibid* at par 28.

[55] *Ibid* at par 29.

[56] *Yatzee Investments CC v CAPX Finance* (n 19).

[57] *Ibid* at par 35.

[58] 2013 (4) SA 539 (SCA).

[59] *Ibid* at par 29.

[60] *Ibid*.

[61] *Ibid*.

[62] *Ibid*.

[63] *Ibid* at par 37.

[64] (228/2014) [2015] ZASCA 69 (20 May 2015).

[65] *Ibid* at par 30.

is present.[66] This belief should be based on a strong foundation.[67] The court in the *Yatzee Investments*[68] case accepted that firstly, there was no way that the Fourth Respondent could have known the financial status of the company when he passed the resolution to place it under business rescue.[69] Secondly, the court agreed with the contentions of the Third Respondent that there were no reasonable grounds to believe that the Applicant could be saved, as all the evidence was based on speculation.[70]

Lastly, counsel for the Applicant attempted to convince the court that there was a reasonable prospect on the basis that if the company was to be sold in the open market as opposed to a forced sale, it would be enabled to obtain a higher dividend.[71] The court explained that the applicant's counsel was still making speculative suggestions, as there was still no evidence illustrating that with time, better offers would be made by investors.[72] In addressing the issue of avoiding liquidation simply because it will result in a forced sale, the court referred back to the *Oakdene* case.[73] The court in the *Oakdene*[74] case insisted that it could not have been the intention of the legislature to establish business rescue as an alternative for those that did not wish to have the company liquidated.[75] It argued that liquidation is to be distinguished as a separate institution from business rescue.[76] In addition, he mentioned that it cannot be that the aim of business rescue is to wind up a company and in order to avoid the ramifications of liquidation.[77]



[66] *Ibid*.

[67] *Ibid*.

[68] *Yatzee Investments CC v CAPX Finance* (n 19).

[69] *Ibid* at par 38.

[70] *Ibid* at par 42.

[71] *Ibid* at par 41.

[72] *Ibid*.

[73] *Ibid* at par 45.

[74] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein* (n 58) par 33.

[75] *Ibid*.

[76] *Ibid*.

[77] *Ibid*.

The court ordered that the resolution and the business rescue plan be set aside and that the Applicant be placed under provisional liquidation.[78] Costs relating to the application were granted against the Applicant and the Fourth Respondent, jointly and severally.[79]

## 3. Legislative Framework

In order to provide context to the decision in the *Yatzee Investments*[80] case, it is important to set out the relevant legislative framework.

### 3.1 Definition of Business Rescue

Section 128(1)(b) of the 2008 Companies Act stipulates that business rescue refers to:

> "…proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
>
> (i) the temporary supervision of the company, and of the management of its affairs, business and property;
>
> (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
>
> (iii) the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;"

By its definition it can be observed that business rescue is a mechanism that grants eligible debtors various protections which are both procedural and substantive.[81] It is also noticeable that

[78] *Ibid* at par 48.

[79] *Ibid*.

[80] *Yatzee Investments CC v CAPX Finance* (n 19).

the role of the business rescue practitioner is vital to the success of the business rescue procedure.[82] The United Nations Commission on International Trade Law (UNCITRAL) legislative guide declares that the business rescue practitioner "plays a central role in the effective and efficient implementation of an insolvency law with certain powers over debtors and their assets and a duty to protect those assets, and their value, as well as interests of creditors and employees, and to ensure that the law is applied impartially and effectively".[83]

Prior to being appointed as a business rescue practitioner, the individual in question will be required to be independent from the company.[84] The 2008 Companies Act explains that this is because the business rescue practitioner is expected to execute his responsibilities in an objective and impartial manner.[85] Upon being appointed, the business rescue practitioner shall be vested with powers of supervisory control over the company, thereby temporarily taking the place of the board that served the company prior to his appointment.[86] The responsibilities of the board will become subject to supervision by the practitioner.[87] After his appointment, the practitioner will have to investigate the affairs of the company, hold meetings with various concerned parties and determine therefrom whether there is any reasonable prospect that the company can be rescued.[88] During this time, the company will be protected from any legal proceedings that other parties may seek to institute against it, save for where the act makes exceptions.[89] The purpose of moratorium under business rescue is to provide the company with some "breathing space" in order to enable it to successfully reorganise its affairs with the assistance of the affected persons



---

[81] Bradstreet "The new business rescue: Will creditors sink or swim?" 2011 128 *South African Law Journal* 352 355.

[82] Loubser "The role of shareholding during corporate rescue proceedings: always on the outside looking in" 2008 *Mercantile Law Journal* 372 386.

[83] UNCITRAL "Legislative guide on insolvency law*"* 2004 http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (20-4-2016).

[84] s 138(d) of the 2008 Companies Act.

[85] *Ibid.*

[86] s 140(1)(a) of the 2008 Companies Act.

[87] Meskin *et al Insolvency Law* (2012) 18.3.2.

[88]*Redpath Mining South Africa (Pty) Ltd v Marsden* 2013 ZAGPJHC 148.

[89] s 133(1) of the 2008 Companies Act.

through the business rescue plan.[90] It is worth noting that where the company has any sureties, the moratorium protection will not extend to them.[91] After all, moratorium is a defense that is personal to the principal debtor.[92]

Should the business rescue practitioner believe that there is a reasonable prospect that the company can become a going concern or, where that is impossible, that the company can provide better returns under business rescue than liquidation, he may then proceed to drawing a rescue plan which shall be placed before creditors and shareholders.[93] Where the rescue plan is approved, the business rescue process ceases and the plan becomes binding on all other concerned parties.[94]

### 3.2 Commencement of Voluntary Business Rescue Proceedings

Prior to the business rescue practitioner taking up his role as explained above, the company will first have to be placed under business rescue.[95] This can be done by either passing a board resolution or applying to the high court to grant an order which places the company under business rescue.[96] However, where liquidation proceedings against the company have already commenced, the board will be prohibited from passing a resolution to place the company under business rescue.[97] It was explained that this preclusion is intended to prohibit directors from applying to place companies under liquidation, and then later decide to initiate business rescue proceedings without any warranting grounds.[98] It was stressed by the court in the *Sulzer Pumps v*



[90] *Cloete Murray v FirstRand Bank* (20104/2014) [2015] ZASCA 39 par 14.

[91] *Ibid* at par 17.

[92] *Ibid*.

[93] *Redpath Mining South Africa (Pty) Ltd v Marsden* (n 88) par 52.

[94] *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers* (n 64) par 42.

[95] s 129 and 131 of the 2008 Companies Act.

[96] *Ibid* at s 129(1) and 131(1) .

[97] *Ibid* at s 129(6).

[98] *Sulzer Pumps v O&M Engineering CC* [2015] JOL 32825 (GP). Loubser expressed in *Some comparative aspects of corporate rescue in the South African company law* (2010 thesis SA) at 51 that it is unfortunate that individual directors and the board are barred from initiating business rescue proceedings after liquidation proceedings have commenced, even where it becomes apparent that the company can be saved.

*O&M Engineering CC*[99] that business rescue applications must rather be made at the first available opportunity.[100]

In order to place a company under voluntary business rescue, section 129(1) of the 2008 Companies Act states that:

> "(1) Subject to subsection (2)(a) the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-
>
> (a) the company is financially distressed; and
> (b) there appears to be a reasonable prospect of rescuing the company."

These provisions above are discussed in further detail in the subsections below.

### 3.2.1 Financial Distress

The phrase "financially distressed" is described by the 2008 Companies Act to be the foreseeability of the company's inability to pay all debts as they become due within the upcoming period of six months.[101] It also extends to instances where it becomes apparent that the company concerned is most likely to become insolvent within the next six months.[102] The act does not expressly state the method to be used in order to determine if a company is financially distressed.[103] It only states that the board must have "reasonable grounds to believe" that the company is financially distressed.[104] As such, it has been argued that as far as the aspect of financial distress is concerned, the test to be used is a subjective one.[105] This is owed to the fact that reliance is placed on the board's discretion to determine if the particular circumstances that

[99] [2015] JOL 32825 (GP).

[100] *Ibid* at par 28.

[101] s 128(1)(f) of 2008 Companies Act.

[102] *Ibid.*

[103] Meskin *et al* (n 87) at 18.3.5.

[104] s 129 of 2008 Companies Act.

105 Meskin *et al* (n 87) at 18.4.1.1.

merit the company being under financial distress are present.[106] It is such instances that give rise to inconsistencies as various tactics will be deployed in making the determination.[107] However, it has been assumed by some that both cash-flow and balance sheet tests are applicable in determining whether a company is financially distressed or not.[108] Further, it has been held that the earlier a company is placed under the rescue mechanism the better the chances are of the company reaching the recovery contemplated under section 129.[109] In addition, some argue that a period of six months is too brief and may even rob the company of the opportunity to fully take advantage of the protection offered by the business rescue process.[110] The basis of this argument is that the average financial planning of a company normally takes place over a one year period and thereby making the period of twelve months appear more appropriate.[111]

The definition of financial distress seems to refer to a situation of factual insolvency and not commercial insolvency.[112] This is, however, not to imply that when considering whether there is a reasonable prospect of returning a company to solvency, only factual solvency is to be taken into account.[113] The definition, as taken from the 2008 Companies Act, is perceived as excluding companies that are already insolvent.[114] For instance, in *Gormley v West City Precinct Properties (Pty) Ltd and Another, Anglo Irish Bank Corporation Ltd v West City Precinct Properties (Pty) Ltd and Another,*[115] it was concluded that business rescue is only applicable to companies that are financially distressed within the realm of the definition in section 128(1)(f).[116] It was cautioned that a company that is not financially distressed should not be placed under business



[106] *Ibid.*

[107] *Ibid.*

[108] Delport *et al Henochsberg on the Companies Act 71 of 2008* (2011) 450.

[109] Finch *Corporate Insolvency Law Perspectives and Principles* (2009) 248.

[110] Loubser (n 10) 58.

[111] *Ibid*.

[112] Delport (n 108) 447.

[113] *Ibid*.

[114] *Merchant West Working Capital Solutions v Advanced Technologies* 2013 ZAGPJHC 109.

[115] 2012 ZAWCHC 33.

[116] *Gormley v West City Precinct Properties (Pty) Ltd v West City Precinct Properties* (n 115) par 11.

rescue.[117] As such, it can be correctly held that financial distress is the "trigger" for commencing business rescue proceedings.[118]

### 3.2.2 Reasonable Prospect

The second requirement that will have to be considered by the board is the existence of a reasonable prospect that the company can be rescued.[119] The use of the term "rescue" under Chapter 6 of the 2008 Companies Act refers to the ability to return a company back to solvency or, alternatively, provide higher returns for creditors and shareholders than would be feasible under liquidation.[120] However, it is important to note that the act falls short of defining what is meant by "reasonable prospect".[121] Nevertheless, it has been conceded that the phrase refers to an objective assessment that should be done against the recent state of the company's affairs.[122] In contrast to instances where business rescue proceedings were initiated by court application, the board does not have to persuade the court of the existence of a reasonable prospect, they only have to believe based on reasonable grounds that there is a reasonable prospect.[123]

To clearly understand the threshold relating to a reasonable prospect, it is important to distinguish it from "reasonable probability", which was used under the judicial management regime.[124] Under the reign of judicial management, the courts had to be convinced that there was a reasonable probability that the company would be able to repay its debts in full and return to solvency.[125] It was clarified that it did not need to be a solid probability but rather one that was reasonable.[126] Unfortunately, it was concluded that the standard of proof required under judicial



[117] *Ibid*.

[118] Davis *et al Companies and Other Business Structures* (2014) 467.

[119] s 129(1)(b) of the 2008 Companies Act.

[120] Davis *et al* (n 118) at 468.

[121] Delport (n 108) 458.

[122] *Ibid* at 447 and 458.

[123] *Ibid* at 459.

[124] Joubert (n 6) 554.

[125] s 427(1) of the 1973 Companies Act.

[126] *Kotzé v Tulryk Bpk* 1977 (3) SA 118 (T) 122.

management was radical and that there were no other types of corporate rescue schemes with similar requirements.[127]

According to the dictionary, the term "probability" means: "the quality or state of being probable"; or "the extent in which something is likely to happen or be the case".[128] In contrast, the term "prospect" has been defined as "the possibility or likelihood of some future event occurring".[129] As can be seen, these dictionary definitions do not make the distinction any clearer. It was suggested that in order to distinguish between the two phrases, one should rather read the rest of the phrases under which the each of the acts (2008 Companies Act and Companies Act 61 of 1973) provide the particular threshold of proof.[130] This will give a better understanding of what was intended by "reasonable prospect for rescuing the company" and "a reasonable probability that the company would be able to pay its debts in full and become a successful concern".[131] Only after embarking on such an exercise does it become clear that the application of the threshold under each Acts differs vastly.[132] It is argued it is this very difference that led to judicial management becoming a failure.[133]

In considering the requirements to place the company under business rescue, the case of *Southern Palace Investments 265 Pty Ltd v Midnight Storm and Others*[134] mentioned that reasonable probability as referred to in the 1973 Companies Act[135] required something more than what is expected by a reasonable prospect.[136] Another distinction drawn by the court was that under the 1973 Companies Act, a creditor was entitled to a liquidation order.[137] It was only in



[127] Kloppers "Judicial Management Reform: Steps to Initiate a Business Rescue" 2001 *South African Mercantile Law Journal* 358 362.

[128] *The concise Oxford dictionary* 10th Edition edited by Judy Pearsall 1139.

[129] Pearsall (n 128) 1148.

[130] Joubert (n 6) 554.

[131] *Ibid* at 555.

[132] *Ibid*.

[133] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein* (n 58) par 28.

[134] 2012 (2) SA (WCC) 423.

[135] Hereinafter referred to as 1973 Companies Act.

[136] *Southern Palace v Midnight Storm* (n 13) par 21.

[137] *Ibid*.

exceptional circumstances that a judicial management order would be granted.[138] The court pointed out that under the business rescue regime, the legislature places weight on rescuing "ailing companies".[139] It was accepted that the legislature under the 2008 Companies Act prefers business rescue over liquidation.[140] The court went on to explain that a rescue plan cannot be considered to have a reasonable prospect of success if the company in question is unable to deal with the actual cause of the financial challenges.[141] It must be shown in the plan that there are real, ascertainable grounds going beyond assumption, to believe that the company can be rescued.[142] In the case of determining a better return for creditors and shareholders, the court emphasised that an applicant must show the origin, nature and extent of the resources that are likely to be obtainable by the company and all other conditions which the company will be required to comply with.[143] The court concluded that the evidence that it had been furnished with amounted to unclear information which lacked enough detail to illustrate that there is a reasonable prospect that the company can be rescued.[144] It added that the plan which was submitted on behalf of the applicant was most likely to "prolong the agony" for creditors.[145]

Similarly, in *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and Another, Investec Bank Ltd v Aslo Holdings (Pty) Ltd,*[146] it was stated that in order to succeed under business rescue, the evidence must be persuasive to justify the belief that there is a reasonable prospect that the company can be rescued.[147] The belief must be based on facts.[148] Where it is not possible for the company to be returned to solvency, the case explains that there would have to be a solid foundation to conclude that there is a reasonable prospect that better returns can be attained for

[138] *Ibid*.

[139] *Ibid* at par 22.

[140] *Ibid*.

[141] *Ibid* at par 24.

[142] *Ibid* at par 21.

[143] *Ibid* at par 25.

[144] *Ibid*.

[145] *Ibid* at par 24.

[146] 2012 ZAWCHC 110.

[147] *Ibid* at par 17.

[148] *Ibid*.

creditors and shareholders.[149] Hypothetical and unclear arguments were said to be insufficient to make the determination.[150]

In *Gormley,*[151] it became apparent to the court that the application for a business rescue order was only for purposes of obtaining a moratorium so that the assets in the company may be retained and with time, hopefully, be in a position the creditors a larger dividend than would result from liquidation.[152] The court highlighted that business rescue aims to restructure companies that appear to be viable in order to enable them to continue operating as a successful concern.[153] It was concluded that in this case there did not appear to be any intention of restructuring the company.[154] The only thing that was sought by the applicant was to allow it to attain a higher return for the company over a lengthened period of time.[155] The court stated that the application completely disregarded the rights of creditors.[156]

In *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd*[157] the court described the concept of a "prospect" to be something that is uncertain and in the future.[158] It explained that it was reliant on a set of factors occurring, as the future is hardly predictable.[159] However, the court mentioned that all facts and evidence to support the contention that the likelihood of rescuing the company exists must be reasonable.[160] In conclusion, it was held that if the minimum requirements for placing a company under business rescue were to be prescribed, as was suggested by the *Southern Palace*[161] case, it "will probably sound the death knell for



[149] *Ibid* at par 19.

[150] *Ibid*.

[151] *Gormley v West City Precinct Properties (Pty) Ltd* (n 115).

[152] *Ibid* at par 15.

[153] *Ibid* at par 12.

[154] *Ibid*.

[155] *Ibid*.

[156] *Ibid.*

[157] 2012 ZAGPPHC 359 (16 May 2012).

[158] *Ibid* at par 33.

[159] *Ibid.*

[160] *Ibid*.

[161] *Southern Palace Investments 265 Pty Ltd v Midnight Storm* (n 134).

business rescue in South Africa and lead to the procedure becoming as ineffective as its predecessor, judicial management".[162]

In *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another,*[163] the court agreed with the *Southern Palace*[164] judgment that a factual foundation will be required to be in existence in order to decide whether a company can be rescued or not.[165] However, it criticised the *Southern Palace*[166] judgment for "placing the bar too high" by stipulating minimum standards that should be followed when determining whether there is a reasonable prospect.[167] The court warned that courts should refrain from applying minimum standards in attempt of establishing a qualification for a reasonable prospect.[168] It was explained that the minimum standards set out in the *Southern Palace*[169] case to establish a reasonable prospect amounted to the same threshold of proof which was required under judicial management.[170] In interpreting the words "reasonable prospect", the judge in *Propspec Investments*[171] defined "prospect" to be an expectation that may or may not occur, which ultimately holds the same meaning as a possibility.[172] However, this possibility must be supported by grounds that are objective and reasonable.[173]

The appeal court in the *Oakdene*[174] case agreed with the view that a reasonable prospect must require more than a *prima facie* situation or a questionable possibility.[175] He also explained that



[162] *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited* (n 157) par 31.

[163] 2013 (1) SA 542 (FB) (28 June 2012).

[164] *Southern Palace Investments 265 Pty Ltd v Midnight Storm* (n 134).

[165] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* (n 163) par 11.

[166] *Southern Palace Investments 265 Pty Ltd v Midnight Storm* (n 134).

[167] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* (n 163) par 11.

[168] *Ibid* at par 12.

[169] *Southern Palace Investments 265 Pty Ltd v Midnight Storm* (n 134).

[170] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* (n 163) par 13.

[171] *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd* (n 163).

[172] *Ibid* at par 12.

[173] *Ibid*.

[174] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein* (n 58).

[175] *Ibid* at par 29.

the term "reasonable" must indicate that the prospect must be based on rational grounds and that a speculative suggestion is not enough.[176] The court also held that it would not be practical to stipulate how business rescue applicants should demonstrate a reasonable prospect, as was suggested in the *Southern Palace*[177] case.[178] However, the court agreed that the applicant must provide a substantial amount of detail in order to satisfy the court.[179] The substantial measure of detail would not necessarily refer to a business rescue plan.[180] It would relate to either returning the company back to a going concern or facilitating a better deal for creditors and shareholders than would be likely from the liquidation.[181]

It is important to note that even though the cases mentioned above relate to the application to commence business rescue by court order, it is submitted that the considerations that are to be taken into account when determining the existence of a reasonable prospect under voluntary business rescue will be similar.[182]

### 3.3 Consequences of non-compliance with the procedural requirements under section 129

Where a board has adopted and filed a resolution to commence business rescue, there are certain procedural requirements that will have to follow.[183] The company is given five business days after adopting and filing the resolution with CIPC (or whatever different period that the Commissioner may stipulate) to notify all the affected persons.[184] It shall do this by publishing a notice of resolution, along with a sworn statement of the facts in which the board relied on prior to passing the resolution.[185] Within the same five days, the board will have to appoint a business

[176] *Ibid*.

[177] *Southern Palace Investments 265 Pty Ltd v Midnight Storm* (n 134).

[178] *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein* (n 58) par 30.

[179] *Ibid*.

[180] *Ibid*.

[181] *Ibid* at par 31.

[182] Delport (n 108) at 458.

[183] See s 129(3), (4) and (5) of 2008 Companies Act.

[184] s 129(3) of 2008 Companies Act.

[185] *Ibid.*

rescue practitioner who shall accept his appointment in writing.[186] Thereafter, the company will be required to file a notice of the appointment of the practitioner within a period two days after his appointment was made.[187] Five days after filing the notice of appointment, the company will be required to publish a copy of the notice of appointment to all affected persons.[188] Where it appears that there has been some non-compliance with section 129(3) and/or (4), section 129(5)(a) will be invoked.[189] This section stipulates that the resolution to commence business rescue will become null and therefore lapse due to the non-compliance.[190] The term "null" may be interpreted by some to mean "void", which would then mean that the resolution should be treated as invalid once the prescribed procedural steps or time frames are breached.[191] The term "lapse" in section 129(5)(a) further reinforces the interpretation that non-compliance with section 129(3) and/or (4) leads to an automatic lapse of the resolution.[192] It was submitted that this is impractical and that it gives rise to a number of problems.[193] It was held that firstly, parties can intentionally pass a resolution to commence business rescue just so that they can take advantage of the protections offered by the process for a brief period before the resolution lapses and becomes null.[194] Secondly, it is averred that in instances where the reasons for non-adherence with the procedural requirements are trivial and without intention, section 129(5)(a) could bring about drastic consequences.[195]

On the other hand, section 130(1) stipulates four grounds on which a resolution can be set aside: a) there are no objective grounds for believing that the company is financially distressed; b) there are no reasonable grounds to believe that the company can be rescued; c) the procedural requirements set out in section 129 were not adhered to; or d) the court finds it just and equitable



[186] *Ibid.*

[187] *Ibid* at s 129(4).

[188] *Ibid.*

[189] See s 129(5)(a) of 2008 Companies Act.

[190] *Ibid.*

[191] Loubser "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part 1)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 501 503.

[192] Delport (n 108) at 464.

[193] *Ibid.*

[194] *Ibid.*

[195] *Ibid.*

to do so.[196] However, the affected persons may only make the application after the company has adopted the resolution but prior to the rescue plan being adopted.[197] Any issues that might arise after the rescue plan has been adopted will not be of any relevance.[198] In conclusion, the provision under section 130(1)(a)(iii) is a clear contradiction of section 129(5)(a). Some have even referred to section 130(1)(a)(iii) as "superfluous" since in the earlier provisions the act makes it clear that any non-compliance with the procedural requirements will lead to an automatic termination of the resolution.[199]

The first case that attempted to untangle these conflicting provisions is *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Techonologies Embarquees.*[200] In this case the court held that once a resolution to commence business rescue is adopted, the matter becomes of considerable urgency.[201] It further argued that there is no confusion about section 129(5)(a).[202] Whether there has been substantial adherence to sections 129(3) and (4), it is irrelevant.[203] The court concluded that any degree of non-adherence with any of these sub-sections amounts to the resolution lapsing and becoming a nullity.[204]

The case of *Ex parte Van den Steen NO and Another*[205] pointed out that the 2008 Companies Act is silent on whether there may be condonations where there has been non-adherence with the procedural requirements.[206] The court stated that the purpose of section 129 is to ensure that all affected parties are aware of the decision of the board and that they can thus exercise their rights



[196] s 130(1)(a) and (5)(a)(ii)of the 2008 Companies Act.

[197] s 130(1) of the 2008 Companies Act.

[198] *Panamo Properties (Pty) Ltd v Nel* (n 15) par 13.

[199] Sharock, Smith and van der Linde *Hockly's Insolvency Law* (2012) 278.

[200] (GNP case no 72522/11). It was referred to as the first case to deal with the inconsistency between 130(1)(a)(iii) and 129(5)(a) see *Panamo Properties (Pty) Ltd v Nel* (n 38) par 17.

[201] *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Techonologies Embarquees* (n 200) par 27.

[202] *Ibid*.

[203] *Ibid*.

[204]*Ibid*.

[205] 2014 (6) SA 29 (GJ).

[206] *Ibid* at par 12.

in terms of section 130.[207] In this case, court held that even though some of the affected persons were not notified of the resolution to commence business rescue in the manner prescribed, they became aware of the resolution to commence business rescue within the stipulated time frame.[208] It concluded that where the parties comply with the most part of section 129(3) and (4), then section 129(5)(a) should not be used to nullify the resolution.[209]

In *ABSA Bank v Caine NO*,[210] the court concurred that section 129(5)(a) nullifies non-adherence with sections 129(3) and (4).[211] However, it highlighted that the court in the *Advanced Technologies*[212] case had not fully rationalised the provisions of section 130(1)*(a)*(iii) prior to handing down its judgment.[213] As a consequence, a dilemma was created.[214] This case called on the legislature to make changes in order to do away with the uncertainty.[215]

In a much different approach, the court in *Panamo*[216] considered the relationship between sections 129(5)(a) and 130(1)(a)(iii) to a much greater extent.[217] The court began by commenting that the approach in the *Advanced Technologies*[218] case completely dismisses the operation of section 130(1)(a)(iii).[219] It elaborated that if business rescue is terminated by virtue of the resolution lapsing and becoming null as envisaged under section 129(5)(a), then there can be no point in invoking section 130(1)(a)(iii).[220] It was argued by counsel for the respondents that



[207] *Ibid* at par 20.

[208] *Ibid* at par 22.

[209] *Ibid* at par 26.

[210] 2014 ZAFSHC 46.

[211] *ABSA v Caine* (n 210) par 25.

[212] *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Techonologies Embarquees* (n 200).

[213] *ABSA v Caine* (n 210) par 25.

[214] *Ibid*.

[215] *Ibid* at par 26.

[216] *Panamo Properties (Pty) Ltd v Nel* (n 15).

[217] *Ibid* at par 8.

[218] *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Techonologies Embarquees* (n 200).

[219] *Panamo Properties (Pty) Ltd v Nel* (n 15) par 20.

[220] *Ibid*.

section 129(5)(a) must be applicable to the procedural requirements under sections 129(3) and (4) and that section 130(1)(a)(iii) would be applicable to the remaining procedural requirements of section 129.[221] The court rejected this submission.[222] It insisted that the phrase "procedural requirements" refers to something that is administrative and procedural.[223] The court explained that the only provisions that resemble procedural requirements under section 129 are only found under sub-sections (3) and (4).[224] In effect, it makes both 129(5)(a) and section 130(1)(a)(iii) relevant when considering the consequences of non-adherence to section 129(3) and (4).[225] In order to reconcile these sections, the court referred back to the law of interpretation.[226] The court's approach was to find the most sensible interpretation out of the sections.[227] It sought to find an interpretation that would avoid any consequences that the legislature never intended.[228] It acknowledged that this would require of it to do a review and give meaning to every word in every section of those particular provisions.[229] After doing so, the court would then have to determine if the conflicting provisions could be reconciled.[230] If this was possible, then they would be reconciled.[231] The court herein believed that the section could be reconciled.[232] The court reverted back to section 129(5)(a) and elaborated that even if the resolution lapses and becomes null, a court will still need to make an order in terms of section 130(5)(a)(iii) to set it aside.[233] As a consequence of setting the resolution aside, business rescue will also terminate in accordance to section 132(2)(a)(i).[234]



[221] *Ibid*.

[222] *Ibid* at par 21.

[223] *Ibid*.

[224] *Ibid*.

[225] *Ibid*.

[226] *Ibid* at par 25.

[227] *Ibid* at par 27.

[228] *Ibid*.

[229] *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 436.

[230] *Minister of Interior v Estate Roos* 1956 (2) SA 266 (A) 271B-C.

[231] *Panamo Properties (Pty) Ltd v Nel* (n 15) par 27.

[232] *Ibid*.

[233] *Ibid* at par 28.

[234] *Ibid*.

### 3.3.1 Consequences of non-adherence with procedural requirements under insolvency law and the court rules

As mentioned earlier, business rescue is a new invention for South Africa.[235] Courts are still attempting to find the most suitable interpretation with respect to those legislative provisions that are unclear.[236] However, there are certain areas of law that have long established the consequences that should follow where there has been a breach with respect to the procedural requirements.[237] Below is an illustration, from a case law perspective, of how the South African courts have dealt with procedural breach over the decades.

In *Krugel v Minister of Police,*[238] the plaintiff served a simple summons on the defendant on the basis that he was wrongfully arrested and held under detention.[239] Since his claim was not based on a liquidated demand or a debt, he should have issued a combined summons as opposed to a simple summons.[240] On this basis, the plaintiff brought an application to court in terms of Rule 27(3) of the Uniform Rules of Court to have the irregularity condoned.[241] Rule 27(3) provides that: "The court may on good cause shown, condone any non-compliance with the Rules". The defendant argued that the court cannot condone the defect as it amounts to a nullity and not an irregularity.[242] In response, the court stressed that it cannot be that non-adherence to the Rules should immediately amount to a nullity, especially when the legislature makes it clear that the court has the discretion to choose to condone if good cause is shown.[243] However, it did admit that where there is a nullity, there would not be any need to set it aside. The court clarified that the difference between a proceeding that is irregular and that which is null is that one can be



[235] *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 ZAGPPHC (n 13) par 23.

[236] *Panamo Properties (Pty) Ltd v Nel* (n 15).

[237] See the cases discussed under this section.

[238] 1981(1) SA 765(T).

[239] *Ibid* at par 766D.

[240] See Rules 1, 18 and 20 of the Uniform Rules of Court.

[241] *Krugel v Minister of Police* (n 235) par 766G.

[242] *Ibid* at par 767A.

[243] *Ibid* at par 767G.

condoned and be made valid, whilst the other cannot.[244] In order to distinguish an irregularity from a nullity, the court rejected that it would be a question of substantial compliance.[245] It concluded that it is rather important to look at prejudice that arose due to the non-compliance.[246] In summary, the court held that the summons should be condoned as the use of the wrong summons does not provide a sufficient ground to set aside the summons.[247]

The court in *SA Instrumentation Pty Ltd v Smithchem Pty Ltd*[248] had to deal with non-compliance of certain procedural provisions set out in the Uniform Rules of Court.[249] The applicant made an application in respect of Rule 30 of the Uniform Rules of Court, which states that the party to whom an irregular proceeding was taken may apply to court to have the step set aside.[250] The applicant alleged that there had been non-compliance with the procedure stated under Rule 4(1)(a)(v).[251] Rule 4(1)(a)(v) provides that: "Service by the Sheriff is effected in the case of a corporation or company by delivering a copy to a responsible employee thereof at its registered office or its principal place of business within the Court's jurisdiction…". In this particular case, the summons were delivered to an incorrect address, which was neither the company's registered address nor its principal place of business.[252] This resulted in the applicant only learning of the summons after the three year prescription period had lapsed.[253] The applicant challenged this on the basis that there was an irregularity in the proceedings.[254]

During the hearing, the court pointed out that it is of importance for the courts to give due consideration to all circumstances in such matters.[255] This will enable them to make a



[244] *Ibid* at par 768D.

[245] *Ibid* at par 767D.

[246] *Ibid* at par 769D.

[247] *Ibid* at par 769G.

[248] 1977 (3) SA 703 (D).

[249] *Ibid* at par 704C

[250] *Ibid.*

[251] *Ibid* at par 704G.

[252] *Ibid* at par 704H.

[253] *Ibid* at par 705G

[254] *Ibid.*

[255] *Ibid* at par 705H.

determination that would be fair for both the applicant and the respondent.[256] Since in actual fact there was no service that had taken place in respect of the applicant, the court ordered that the service be nullified.[257] The court expressed that granting a condonation in this particular case would have been prejudicial towards the applicant as it was unaware of the service for over a period of three years.[258] Consequently, the court ordered that the summons be set aside.[259]

In *Gravato NO. (Cloete Intervening Party),*[260] the court had to adjudicate on the issue of non-adherence with the procedural requirements prescribed under section 4(3) of the Insolvency Act 24 of 1936 (hereinafter "Insolvency Act").[261] The applicant herein applied to the court to have his estate surrendered, in accordance with the Insolvency Act.[262] However, a creditor opposed the voluntary surrender of the estate.[263] Amongst other allegations, he argued that the surrender of the estate was not compliant with the provisions of section 4(3) of the Insolvency Act.[264] Section 4(3) directs that: "The petitioner shall lodge at the office of the Master a statement in duplicate of the debtor's affairs, framed in a form corresponding substantially with Form B in the First Schedule to this Act. The statement shall contain particulars for which provision is made in the said Form, shall comply with any requirements therein and shall be verified by affidavit (which shall be free from stamp duty) in the form set forth therein." Whilst the applicant did not dispute that there was some non-compliance with section 4(3), he pointed out that he had complied with the most of the requirements under the Insolvency Act.[265] The applicant asserted that the court should give due consideration to the matter and condone the aspect that he was



[256] *Ibid.*

[257] *Ibid* at par 706F.

[258] *Ibid.*

[259] *Ibid* at par 707A.

[260] 2016 JDR 0516 (GP).

[261] *Ibid* at par 3.1.

[262] *Ibid* at par 1.

[263] *Ibid* at par 3.

[264] *Ibid* at par 3.1.

[265] *Ibid* at par 4.

unable to comply with.[266] The applicant supported this averment by stating that he had since divulged the relevant information.[267]

The court referred to the case of *Ex parte Henning*,[268] which explained that the purpose of section 4(3) is to make the creditors and the public aware of the position of the debtor's financial circumstances.[269] This would enable them to decide on the best manner to protect their interests in respect of the estate that is being surrendered.[270] The court herein expressed that the implication of not complying with the requirements under section 4(3) is that it may be taken to be an act of insolvency in terms of section 8(f).[271] It further explained that in the ordinary course, any flawed compliance with the section would amount to failure to surrender the application, unless the non-adherence is found to be trivial.[272] Where the court finds that the non-compliance is material, it will not be in a position to condone it.[273] In this case, the court found that the applicant had not even deposed an affidavit before a commissioner of oath which would illustrate that he understands the content and its binding effect.[274] As such, the court declared that the document could not be considered to be an affidavit.[275] The court therefore found it justified to dismiss the application on the basis of material non-compliance.[276]

In *Ex Parte Minnie Er Uxor*[277] the applicants were married in community of property.[278] They decided to make an application to the court for rehabilitation in accordance with section 124(2)(a) of the Insolvency Act.[279] The notice of intention to apply for the rehabilitation was



[266] *Ibid.*

[267] *Ibid* at par 5

[268] 1981 (3) SAS 843 (OPD).

[269] *Ibid* at par 10.

[270] *Ibid*.

[271] *Ibid*.

[272] *Ibid.*

[273] *Ibid* at par 11.

[274] *Ibid*.

[275] *Ibid.*

[276] *Ibid.*

[277] 1996 3 SA 97 (SEC).

[278] *Ibid* at par 97I.

[279] *Ibid.*

published in the Government Gazette, but neglected to display their identity numbers.[280] The information that was included was their full names, date of birth and occupation, as at date of sequestration.[281]

The court explained that where there is an irregularity, the starting point would be to question whether the irregularity has led to any prejudice.[282] Where the court finds that the irregularity has not contributed to any prejudice, the irregularity will be made effective.[283] However, where the court finds that there has been some prejudice as a result of the irregularity, the court will try to find out whether the prejudice can be remediated by a court order.[284] The court highlighted that as far as procedural matters go, the law upholds "flexibility rather than rigidity as substance rather than form is of primary importance".[285]

The judge in this case believed that even without the identity numbers of the applicants, the information contained in the Government Gazette was sufficient to identify the applicants.[286] As such, he held that the irregularity could not have led to any prejudice and therefore granted the order for rehabilitation.[287]

It can be noted from the cases discussed above that even though some of them date as far as four decades back, the courts have been consistent in following the same rationale when dealing with breach of procedural requirements.[288] This may be an indication that their interpretation is correct.



[280] *Ibid* at par 98A.

[281] *Ibid* at par 99B.

[282] *Ibid* at par 98D.

[283] *Ibid* at par 98F.

[284] *Ibid* at par 98F.

[285] *Ibid* at par 99C.

[286] *Ibid* at par 99E.

[287] *Ibid.*

[288] The judgement in *Gravato (Cloete Intervening Party)* was handed down in 2016.

### 3.4 Commencement by Court Order

In contrast to voluntary business rescue, a company may also be placed under business rescue by a court order.[289] This may be initiated by an affected person who applies to the court to place a company under supervision and business rescue.[290] The court will consider the case and may decide to place the company under business rescue where it is satisfied that: a) the company is under financial distress; b) the company was unable to pay amounts outstanding that arose from an obligations contract, public regulations, employment related matters; or c) it appears to be just and equitable to do so from a financial perspective.[291] It is further required that where any of the three requirements are present, the court must also be satisfied that there is a reasonable prospect for rescuing the company.[292]

The major difference between commencing business rescue by a resolution as opposed to a court order is that the board does not have to satisfy the court that the company is financially distressed or that a reasonable prospect is present at the time of adopting the resolution.[293] The decision will be solely based on the belief of the director.[294] It is arguable that the method that relies on the court to place the company under business rescue, is most likely guard off abuses by the board.[295]



## 4. Analysis of the *Yatzee Investments*[296] judgment

The first issue raised by the Third Respondent was the fact that the Applicant failed to publish a notice of the resolution within the timeframes provided by section 129(3).[297] It argued that as a

[289] s 131(1) of the 2008 Companies Act.

[290] *Ibid.*

[291] *Ibid* at s 131(4).

[292] *Ibid* at s 131.

[293] Delport (n 108) 459.

[294] s 129(1) of the 2008 Companies Act.

[295] Loubser (n 191) at 505. Research done by Pretorius in 2015 for the CIPC discloses that the low success rate of business rescue can be owed to the fact that some of the companies placed under the voluntary rescue process did not deserve to undergo the business rescue proceedings.

[296] *Yatzee Investments CC v CAPX Finance* (n 19).

result, the resolution commencing business rescue is null.[298] The court correctly gave consideration to the *Panamo*[299] case and concluded that the resolution could only be set aside by the court by way of application in terms of section 130(1)(a)(iii).[300] This gave the court the opportunity to take all the relevant circumstances into account and make a ruling that would fair and sensible. In determining fairness, the court in this case should have ascertained whether any of the affected persons suffered any prejudice as a result of the non-compliance by the Applicant, and whether it could remediate the prejudice.[301] Hence, it would have been flawed if the court had followed the interpretation that non-compliance with section 129(3)(a) leads to an automatic termination of the resolution. This line of interpretation completely disregards the existence of section 130(1)(a)(iii). By immediately invaliding the resolution as a result of procedural breach, it would mean that there is nothing for the court to set aside. In this particular case, it is stated that the resolution was filed on 26 November 2014 and the publication of the notice took place on 2 December 2014, two days later than the prescribed period.[302] This is clearly a minor technicality which cannot be said to have prejudiced the rights of any affected person, especially because the business rescue plan was never adopted. It would be unwarranted to invalidate the resolution on this basis.

Further, the interpretation followed in the *Panamo*[303] judgment hampers situations where parties objecting to the resolution would simply raise a technicality in order to have the process terminated, even where it is clear from the facts that the requirements of passing a resolution to commence business rescue are present. This would amount to abuse of process. As mentioned by the *Ex parte van den Steen*[304] case, the purpose of the procedural provisions in section 129 is to ensure that affected persons are made aware of the resolution taken by the board.[305] This will

---

[297] *Yatzee Investments CC v CAPX Finance* (n 19) par 29.

[298] *Ibid*.

[299] *Panamo Properties (Pty) Ltd v Nel* (n 15).

[300] *Ibid* at par 34.

[301] See *Ex Parte Minnie Et Uxor* (n 277) par 99E.

[302] *Yatzee Investments CC v CAPX Finance* (n 19) par 30.

[303] *Panamo Properties (Pty) Ltd v Nel* (n 15).

[304] *Ex parte Van den Steen* (n 205).

[305] *Ibid* at par 22.

enable them to exercise their rights before the business rescue plan is adopted.[306] Nonetheless, it should be borne in mind that the main aim of business rescue is to save ailing companies, as their failure will have an adverse impact on the economy and the affected persons.[307] Allowing the business rescue proceedings to terminate due to non-compliance with "administrative" requirements should not be regarded as being more important than compliance with the substantive requirements of placing a company under voluntary business rescue. It was correctly stated in *Advanced Technologies*,[308] time is of the essence when it comes to rescue proceedings.[309] Where the business rescue proceedings are set aside, the company will have to wait a further three months from the date on which the resolution was adopted in order to file another resolution to re-commence business rescue.[310] The company might even become insolvent as it waits for this three months' time period to lapse, which will then place it outside the definition of a financially distressed company. Thus, it is the responsibility of the court to weigh out whether, based on all the affected persons' circumstances, the resolution commencing business rescue should be set aside or not.

As a result of the manner in which the *Yatzee Investments*[311] case interpreted the implications of section 129(5)(a), the court was able to conclude that the resolution should not be set aside.[312] As such, the court was enabled to assess whether the member complied with the substantive requirements for placing the close corporation under business rescue.[313]

One of the averments raised by the Third Respondent was that there was no basis for the Fourth Respondent to illustrate that the Applicant was financially distressed.[314] It is conceded that the court in this case correctly agreed with this contention. The fact that the Applicant was placed

[306] *Ibid*.

[307] Cassim *et al The Law of Business Structures* (2013) 163.

[308] *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Techonologies Embarquees* (n 200).

[309] *Ibid* at par 27.

[310] s 129(5)(b) of the Companies Act 2008.

[311] *Yatzee Investments CC v CAPX Finance* (n 19).

[312] *Ibid* at par 34.

[313] *Ibid*.

[314] *Ibid* at par 2.

under voluntary business rescue at the end of November 2014 whilst as at late July 2015, the financial statements for the periods ended February 2013 and 2014 were still incomplete was questionable.[315] The Fourth Respondent did not even have the relevant information necessary to project whether the Applicant would become unable to pay its debts or become insolvent within the immediate ensuing six months. This clearly indicates that he placed the Applicant under business recue without verifying its financial position. It is even possible that at the time when he passed the resolution to place the company under business rescue, the company was already insolvent. This is in no doubt misuse of the voluntary business rescue process, especially when it could not be established that the "trigger" to place a company under business rescue was in existence at the time of passing the resolution. It is submitted that after establishing that there were no objective grounds to believe that the Applicant was financially distressed, there was no need for the court to resume to the requirement relating to a reasonable prospect.

The Third Respondent's further argument was that the Fourth Respondent could not have genuinely believed that there was a reasonable prospect that the Applicant could be rescued.[316] The court supported this argument.[317] The fact that there were no management accounts or financial statements that correctly provided the exact financial status of the Applicant should have made it difficult to comprehend how there could have been a reasonable prospect if the extent of the problem could not clearly be defined.[318] The value of the property that the Applicant sought to sell was also uncertain.[319] The business rescue practitioner even admitted that they were still waiting for an independent valuator.[320] The business rescue practitioner further mentioned that the Fourth Respondent had found a "possible investor", whom he could not disclose much about as the negotiations were at a "sensitive stage".[321] All this uncertain information provided by the business rescue practitioner make it clear that it is not possible that at the time of passing the resolution, the Fourth Respondent could have had any reasonable

[315] *Ibid* at par 22.

[316] *Ibid* at par 29.

[317] *Ibid*.

[318] See *Yatzee Investments CC v CAPX Finance* (n 19) par 13.1 and 13.2.

[319] *Ibid* at par 14.

[320] *Ibid*.

[321] *Ibid* at par 15.

grounds to believe that the company could be rescued. Even the argument that over R86 000 from rental income and commissions of sales was expected to be received every month could not suffice.[322] The Fourth Respondent had not even provided the practitioner with any document to support this.[323] All of this information amounts to speculation of what might possibly occur if given more time. The submissions made by the practitioner are not persuasive enough to illustrate that there is a reasonable prospect to believe that the company could be rescued. They amounted to claims. It is not clear what the grounds were that satisfied the business rescue practitioner, after doing his investigations and meeting with the creditors, that there was a reasonable prospect that the company could be rescued. In conclusion, it is accepted that the line of reasoning that the court used to conclude there was no reasonable prospect is correct.

However, had the court considered the motive behind the Fourth Respondent's actions with respect to placing the Applicant under business rescue, it might have inferred that it was linked to his continued receipt of a monthly salary from the close corporation.[324] The court did mention that he appeared to be "a man of straw" who played for time against his own indebtedness.[325] If this is correct, then the Fourth Respondent breached his fiduciary duty of upholding the best interests of the Applicant.[326] Had he placed the close corporation under liquidation at the moment he realised that it was becoming unable to pay its debts, it would not have attracted any further interest arising from the debt owed to the Third Respondent. And further, for the fact that years went by without any certainty to the financial status of the Applicant, this indicated that the Fourth Respondent was negligent in his role as a member of the close corporation. As a result, the court should have ordered that he becomes personally liable for all further costs that the Applicant incurred after he (the Fourth Respondent) became aware that it was unable to pay its debts.[327]

[322] *Ibid*.

[323]*Ibid.*

[324] See *Yatzee Investments CC v CAPX Finance* (n 19) par 20.1.

[325] *Ibid* at par 26.

[326] See s 42(2)(a)(i) of Close Corporations Act.

[327] *Ibid* at ss 42(3)(a) and 43(1).

## 5. Conclusion

In contrast to judicial management, the emergence of business rescue brought about a brim of new hope that jobs could be saved, debts become paid and investments protected.[328] But it cannot go without saying that the transition is an easy one. Some of the provisions under Chapter 6 of the 2008 Companies Act reveal some of the legislature's impediments. In some instances the legislation makes use of phrases which are open to various interpretations, whilst in other instances, the provisions are in contradiction of each other. This attributes to confusion and somewhat misaligns the intention of the legislature.

Allowing business rescue to be commenced by a resolution gives directors an opportunity to place companies under the rescue process as soon as they become aware that the company is financially distressed. Voluntary business rescue is perceived as a quicker process that is also cost effective due to minimal court intervention. However, the disadvantage of the voluntary business rescue proceedings is that the board is wholly entrusted with the power to determine whether the company is financially distressed in terms of the section 128(1)(f). This is mainly due to the fact that the boards of directors are the most aware of the business affairs of the company. In attempt of providing safeguards against any misuse, the legislature imposes strict time frames in hope of avoiding dilatory tactics that might be used for the purpose of buying time. Nevertheless, it is conceded that it is not in all instances that non-adherence with the time frames is due to the intention to exploit legislation. As such, it is important that the courts make the determination, based on all relevant circumstances, of whether the voluntary business rescue proceedings are worth aborting or not. In making this determination, it is important for the courts to take into account the actual likelihood that the company could be rescued in terms of section 129, as well as any prejudices that might have been suffered due to the non-compliance. If the reasonable prospect appears to be likely, then surely this could override the fact that there has been some trivial non-compliance with the procedural requirements. As mentioned previously, time is of the essence with respect to business rescue. The longer the company is delayed to be placed under business rescue proceedings, the more critical its financial anguish is likely to

[328] Henning and Rajak (n 2) 262.

become. Hence, the aim of business rescue is to save companies that are economically viable and not "chronically ill".[329]

Further, it is also important that where courts are faced with the task of interpreting legislation, they should do so in a manner that is sensible, practical and in line with the objects of the particular legislation.[330] It should be borne in mind that when courts provide an interpretation on legislation, they set precedent for other cases to follow. It must be pointed out that the interpretation given by the courts with respect to sections 129(5)(a) is somewhat artificial as it moves away from the ordinary meaning of the word. Until such a time that the legislature amends this section, the interpretation given by the *Panamo*[331] case, is the most practical as it avoids abuse of process.

The business rescue regime is a great initiative for South African companies and close corporations. It is evident that the legislature has reconciled itself with the fact that liquidation would not suffice, in most cases, as it causes significant collateral damage at an economic and social level which results in adverse impact on wealth and the livelihood of society.[332] By implementing business rescue, adverse consequences that would normally flow from the implementation of liquidation are minimised. In this way the interests of the creditors, investors and employees are taken into account. However, it is clear from all the cases discussed above that business rescue is still at a test and trial stage for South Africa. Fortunately, the provisions of legislation are not set in stone, the legislature still has the power to make amend to any shortfalls.



[329] *Welman v Marcelle* (n 12) par 28.

[330] *Panamo Properties (Pty) Ltd v Nel* (n 15) par 20.

[331] *Panamo Properties (Pty) Ltd v Nel* (n 15).

[332] *Koen v Wedgewood Village Golf & Country Estate (Pty)* Ltd 2011 JDR 1827 (WCC) 14.

## Bibliography

### Articles


1. Bradstreet R "The Leak in the Chapter 6 Lifeboat: Inadequate Regulation of Business Rescue Practitioners May Adversely Affect Lenders' Willigness and the Growth of the Economy" 2010 *Mercantile Law Journal* 195.
2. Bradstreet R "The new business rescue: Will creditors sink or swim?" 2011 *South African Law Journal* 352.
3. Henning J and Rajak H "Business rescue for South Africa" 1999 *South African Law Journal* 262.
4. Joubert EP ""Reasonable possibility" versus "reasonable prospect": Did business rescue succeed in creating a better test than judicial management?" 2013 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 550.
5. Kloppers P "Judicial Management Reform: Steps to Initiate a Business Rescue" 2001 *South African Mercantile Law Journal* 358.
6. Loubser A "Tilting at windmills? The quest for an effective corporate rescue procedure in South African law" 2011 *South African Mercantile Law Journal* 1.
7. Loubser A "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part 1)" 2010 *Tydskrif vir die Suid-Afrikaanse Reg* 501.
8. Loubser A "The role of shareholding during corporate rescue proceedings: always on the outside looking in" 2008 *Mercantile Law Journal* 372.


### Books


1. Botha C *Statutory Interpretation: An Introduction for Students* Juta Co & Ltd (2012).
2. Burdette DA, Galgut B, Kunst JA, Magid PAM and Meskin PM *Insolvency Law* Lexis Nexis (Durban) (2012).

3. Coetzee L, Burdette D, Buttler D, Davis D, Geach W, Loubser A, Mongoalo T, Oxford University Press *Companies and Other Business Structures* (2014).

4. Delport P, Meskin PM, Q Vorster *Henochsberg on the Companies Act 71 of 2008* Lexis Nexis (2011).

5. Finch V *Corporate Insolvency Law Perspectives and Principles* Oxford University Press (2009).

6. Sharock R, Smith AD and van der Linde K *Hockly's Insolvency Law* Juta Co & Ltd (2012).

**Cases**

1. *Absa v Caine* 2014 ZAFSHC 46.

2. *Advanced Technologies and Engineering Company (Pty) Ltd v Aeronautique et Techonologies Embarquees* (GNP case no 72522/11).

3. *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers and Others* (228/2014) [2015] ZASCA 69 (20 May 2015).

4. *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 436.

5. *Cloete Murray v FirstRand Bank* (20104/2014) [2015] ZASCA 39.

6. *Employees of Solar Spectrum Trading 83 (Pty) Limited v AFGRI Operations Limited and Another, In Re; AFGRI Operations Limited v Solar Spectrum Trading 83 (Pty) Ltd* 2012 ZAGPPHC 359 (16 May 2012).

7. *Ex parte Henning* 1981 (3) SAS 843 (OPD).

8. *Ex Parte Minnie Et Uxor*1996 3 SA 97 (SEC).

9. *Gravato NO. (Cloete Intervening Party)* [2016] ZAGPPHC 207 (18 March 2016).

10. *Gormley v West City Precinct Properties (Pty) Ltd v West City Precinct Properties* [2012] ZAWCHC 33 (18 April 2012).

11. *Koen v Wedgewood Village Golf & Country Estate (Pty) Ltd* 2011 JDR 1827 (WCC) 14.

12. *Kotzé v Tulryk Bpk* 1977 (3) SA 118 (T) 122.
13. *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and Another, Investec Bank Ltd v Aslo Holdings (Pty) Ltd* [2012] ZAWCHC 110 (22 February 2012).
14. *Krugel v Minister of Police* 1981(1) SA 765(T).
15. *Merchant West Working Capital Solutions v Advanced Technologies* 2013 ZAGPJHC 109.
16. *Minister of Interior v Estate Roos* 1956 (2) SA 266 (A).
17. *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* 2013 (4) SA 539 (SCA).
18. *Propspec Investments (Pty) Ltd v Pacific Coast Investments 97 Ltd and Another* [2012] ZAFSHC 130; 2013 (1) SA 542 (FB) (28 June 2012).
19. *Panamo Properties (Pty) Ltd v Nel* 2015 3 All SA 274 (SCA) (27 May 2015).
20. *Redpath Mining South Africa (Pty) Ltd v Marsden* 2013 ZAGPJHC 148.
21. *Rennie v Holzman* 1989 2 SA 374 (A) (9 May 1989).
22. *SA Instrumentation Pty Ltd v Smithchem Pty Ltd* 1977 (3) SA 703 (D).
23. *Southern Palace Investments 265 Pty Ltd v Midnight Storm and* Others 2012 (2) SA (WCC) 423.
24. *Sulzer Pumps v O&M Engineering CC* [2015] JOL 32825 (GP).
25. *Swart v Beagles Run Investments 25 (Pty) Ltd* 2011 ZAGPPHC 103 (30 May 2011) (unreported).
26. *Welman v Marcelle Props* 193 CC (33958/2011) 2012 ZAGPJHC 32 (24 February 2012).
27. *Yatzee Investments CC v CAPX Finance Pty Ltd* (3300/2015) [2015] ZAWCHC 117 (26 August 2015).

**Thesis**

1. Loubser *Some Comparative Aspects of Corporate Rescue in the South African Company Law* (2010 thesis SA).

**Internet Sources**

1. UNCITRAL "Legislative guide on insolvency law" available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf

**Legislation**

1. Companies Act 71 of 2008.
2. Close Corporations Act 69 of 1984.
3. Companies Act 61 of 1973.
4. Insolvency Act 24 of 1936.

**Miscellaneous**

1. Uniform Rules of Court.